UNITED STATES DISTRICT COURT

DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA	)	
	)	
	)	
v.	)	**CRIMINAL NO: 01-44 (DRD)**
	)	
JOSE NIEVES-RAMOS #1	)	
EDUARDO OSORIO-ROJAS #2,	)	
	)	
DEFENDANTS	)	

ORDER

On Wednesday, March 6, 2002, I conducted a conference of counsel in this case. In the course of discussions concerning witness availability, specifically the defendants' chemistry expert, I learned that both the Government's expert chemist and the defendants' expert chemist will testify that the substance in question is cocaine base. At this point the Government does not expect to have its chemist testify that the substance is also crack, but the defendants expect to have their chemist testify that although it is cocaine base, it is not crack. The defendants maintain that the Government has the burden of proving to the jury beyond a reasonable doubt that the substance is crack. They have two reasons: that after Apprendi v. New Jersey, 530 U.S. 466 (2000), it is a jury issue; and because the Indictment refers to crack. The lawyers referred me to a number of First Circuit cases, and I have consulted additional cases. As a result, I now **ORDER**:

1. Neither expert chemist will be permitted to testify that the substance (which the parties agree is cocaine base) is or is not crack. The First Circuit has said on a number of occasions that the designation of cocaine base as crack is not a matter for expert chemist testimony:

> Chemical analysis cannot establish that a substance is crack ... because crack is chemically identical to other forms of cocaine base, although it can reveal the presence of sodium bicarbonate, which is usually used in processing crack. Lay opinion testimony suffices to prove that a substance is crack.

United States v. Richardson, 225 F.3d 46, 50 (1st Cir. 2000) (internal citations omitted).

> [T]he government could bridge the evidentiary gap between cocaine base and crack cocaine by presenting lay opinion evidence (or an opinion proffered by an expert who possessed practical as opposed to academic credentials) from a "reliable witness who possesses specialized knowledge" (gained, say, by experience in dealing with crack or familiarity with its appearance and texture).

United States v. Martinez, 144 F.3d 189, 190 (1st Cir. 1998).

> Chemical analysis cannot distinguish crack from any other form of cocaine base because crack and all other forms of cocaine base are identical at the molecular level. Thus, no further scientific testimony would have been of any conceivable assistance. . . .

United States v. Robinson, 144 F.3d 104, 109 (1st Cir. 1998).

2. It is not necessary for the jury to find that the cocaine base is also crack.

A. Apprendi does not require such a determination. All the statutory penalties are based on the substance being cocaine base; the statute simply does not use the term crack. See 21 U.S.C. § 841. That term appears in the Guidelines. See Richardson, 225 F.3d at 49-50 (drawing the distinction between what the statute requires and Guideline definitions). But Guideline determinations are for the court by a preponderance of the evidence. According to the First Circuit:

> Whether a particular substance is crack or cocaine for purposes of the sentencing guidelines is a question of fact to be determined by the court. When the nature of an illicit substance is material at sentencing, the government has the burden to prove the substance's identity, but its proof need only be by a preponderance of the evidence.

Robinson, 144 F.3d at 109 (internal citations omitted).

B. The wording of the Indictment does not require such a determination. The reference to crack is mere surplusage; indeed, the term even appears in parentheses. The

Indictment refers to possession and conspiracy of a specific quantity of: "cocaine base ('crack' cocaine), a Schedule II Narcotic Drug Controlled Substance." As I have already said, crack is not even a statutory term. It is therefore not an essential element of the Government's case.

3. I do not now determine whether someone other than a chemist, such as a DEA agent, will be permitted to testify that this cocaine base is in fact crack. That is a relevance determination to be made at trial. (Obviously participants in the alleged conspiracy can testify that they thought they were selling or buying crack.)

For these reasons, the availability of the chemists is not critical to the scheduling of the case for trial. (Indeed, since the experts appear to be in agreement on the only question about which they can testify, the lawyers may reasonably decide that they should simply stipulate that the substance is cocaine base, thereby saving time and money.)

Accordingly this case will remain on the trial list for March 18, 2002. The Government expects two days for trial.

SO ORDERED.

Dated at San Juan, Puerto Rico, this 8th day of March, 2002.

D. BROCK HORNBY
UNITED STATES CHIEF DISTRICT JUDGE
DISTRICT OF MAINE
SITTING BY DESIGNATION

U.S. District Court
Puerto Rico (San Juan)
Criminal Docket For Case #: 01-CR-44-ALL

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